90-617

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JAMES M. DOMBROSKI,
Petitioner,

v.

F2 AMERICA, INC., and F2 INTERNATIONAL, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Dated: October 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the Federal Magistrates Act empowers a magistrate to impose sanctions on an attorney under Federal Rule of Civil Procedure 11 subject only to review for clear error by an Article III judge.

PARTIES TO THE PROCEEDING

Petitioner is James M. Dombroski. Respondents are F2 America, Inc., and F2 International, Inc.* Craig John Maisonville was a party to the proceedings in the trial court.

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* There are no parents, subsidiaries, or affiliates of the named parties that are not wholly owned, either directly or indirectly, by one or more of them.

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F2 AMERICA, INC., and F2 INTERNATIONAL, INC.,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

James M. Dombroski respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals upon which petitioner seeks review (App., *infra*, 1a-8a) is reported at 902 F.2d 746 (9th Cir. 1990). The opinion of the district court (App., *infra*, 10a-14a) is unreported. The opinion of the magistrate (App., *infra*, 15a-20a) is also unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 1a) was entered on May 4, 1990. A petition for rehearing with suggestion for rehearing *en banc* was denied on July 20, 1990 (App., *infra*, 9a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Article III, Section 1 of the Constitution provides in pertinent part:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

28 U.S.C. § 636 provides in pertinent part:

> (b) (1) Notwithstanding any provision of law to the contrary—
>
> (A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.
>
> (B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.
>
> (C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

> Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

Fed. R. Civ. P. 11 provides in pertinent part:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of

the pleading, motion, or other paper, including a reasonable attorney's fee.

Fed. R. Civ. P. 72:

(a) *Nondispositive Matters.* A magistrate to whom a pretrial matter not dispositive of a claim or defense of a party is referred to hear and determine shall promptly conduct such proceedings as are required and when appropriate enter into the record a written order setting forth the disposition of the matter. The district judge to whom the case is assigned shall consider objections made by the parties, provided they are served and filed within 10 days after the entry of the order, and shall modify or set aside any portion of the magistrate's order found to be clearly erroneous or contrary to law.

(b) *Dispositive Motions and Prisoner Petitions.* A magistrate assigned without consent of the parties to hear a pretrial matter dispositive of a claim or defense of a party or a prisoner petition challenging the conditions of confinement shall promptly conduct such proceedings as are required. A record shall be made of all evidentiary proceedings before the magistrate, and a record may be made of such other proceedings as the magistrate deems necessary. The magistrate shall enter into the record a recommendation for disposition of the matter, including proposed findings of fact when appropriate. The clerk shall forthwith mail copies to all parties.

A party objecting to the recommended disposition of the matter shall promptly arrange for the transcription of the record, or portions of it as all parties may agree upon or the magistrate deems sufficient, unless the district judge otherwise directs. Within 10 days after being served with a copy of the recommended disposition, a party may serve and file specific, written objections to the proposed findings and recommendations. A party may respond to another party's objections within 14 days after being served with a copy thereof. The district judge to

whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate's disposition to which specific written objection has been made in accordance with this rule.

STATEMENT

Petitioner James M. Dombroski, an attorney, represented the plaintiff in a trademark action in the United States District Court for the District of Hawaii. Local Rule 401-3 referred all "non-dispositive pretrial matters" in that case for hearing by a federal magistrate. App. at 2a.[1] Under the Federal Magistrates Act, those magistrates are appointed by the judges of each district court and serve eight-year terms. 28 U.S.C. § 631(a) & (e).

Shortly after the parties settled the underlying action, the magistrate imposed a monetary sanction of $1000 on petitioner under Rule 11 of the Federal Rules of Civil Procedure for having filed a frivolous motion. App. at 2a. When petitioner appealed to the district court, the court reviewed the magistrate's order imposing sanctions only for "clear error." *Id.* at 3a . Applying this deferential standard of review, the district court affirmed the award of sanctions. *Id.*

Petitioner appealed to the Ninth Circuit, urging that the magistrate could not, and should not, have imposed sanctions. The Ninth Circuit considered whether the magistrate could himself *impose* Rule 11 sanctions on an attorney or whether the magistrate could only *recommend* to the district court that it impose sanctions, with the ultimate determination to be made by the district court de novo. The Ninth Circuit chose the first alterna-

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[1] District of Hawaii Local Rule 401-3 provides in pertinent part: *Determination of non-dispositive pretrial matters; 28 U.S.C. Section 636(b)(1)(A).* Unless otherwise ordered, a magistrate shall hear and determine any pretrial motions including discovery motions in a civil or criminal case.

tive, holding that the magistrate had authority to *impose* sanctions on petitioner under the Federal Magistrates Act, 28 U.S.C. § 636(b)(1)(A). App. at 4a-5a. The court reasoned that an order imposing sanctions resolves mere "non-dispositive matters," which magistrates can decide subject only to review for clear error. *Id.*

Turning to the merits, the Ninth Circuit found that the facts warranted the district court's conclusion that the magistrate did not commit "clear error" in sanctioning petitioner. *Id.* at 7a. The appellate court therefore affirmed the trial court decision.

The Ninth Circuit denied a petition for rehearing with suggestion for rehearing *en banc* on July 20, 1990.

REASONS FOR GRANTING THE PETITION

Since 1983 practice under Rule 11 has become a cottage industry of the litigation bar. *See, e.g.*, Joseph, *The Trouble With Rule 11*, 73 A.B.A. J. 87, 88 (Aug. 1987).[2] Simultaneously, questions about the powers of non-Article III judges have repeatedly troubled the courts. *See, e.g.*, *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982) ("the broad grant of jurisdiction to the bankruptcy courts . . . is unconstitutional"). This case lies at the intersection of those two bodies of law: It poses the important and unresolved question whether federal magistrates can impose Rule 11 sanctions on at-

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[2] "Since [1983] judges have issued more than 1000 published opinions analyzing Rule 11 and finding actions frivolous under it." Labaton, *Courts Rethinking Rule Intended to Slow Frivolous Lawsuits*, N.Y. Times, Sept. 14, 1990, at B12, col. 2. In the last year alone, this Court has accepted three Rule 11 cases for review. *See Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, No. 89-1500, *cert. granted*, 58 U.S.L.W. 3817 (June 25, 1990); *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447 (1990); *Pavelic & LeFlore v. Marvel Entertainment Group*, 110 S. Ct. 456 (1989).

torneys appearing before them. The Ninth Circuit in this case acknowledged the importance of this issue, App. at 3a-4a; the First Circuit has since characterized the question as "vexing." *Lancellotti v. Fay*, 909 F.2d 15, 17 n.2 (1st Cir. 1990).

This issue is one of national importance and has caused confusion in the lower courts. It merits review by this Court.

THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE AN IMPORTANT AND UNRESOLVED QUESTION OF FEDERAL LAW—WHETHER THE FEDERAL MAGISTRATES ACT EMPOWERS MAGISTRATES TO IMPOSE RULE 11 SANCTIONS ON ATTORNEYS.

A. The Ninth Circuit Has Decided An Important Question Of Federal Law That Ought To Be Resolved By This Court.

In enacting the Federal Magistrates Act, Congress was well aware of the requirements of Article III of the Constitution. Congress plainly did not intend to give federal magistrates the power exercised here.

Article III, Section 1 of the Constitution provides that "the judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." This Court has jealously guarded the "judicial Power"—"the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision." *Muskrat v. United States*, 219 U.S. 346, 356 (1911).

Magistrates do not enjoy Article III status. Accordingly, under the Magistrates Act, "[i]f the essential, constitutional role of the judiciary is to be maintained, there must be both the appearance and the reality of control by Article III judges over the interpretation, declaration

and application of federal law." *Pacemaker Diagnostic Clinic of America v. Instromedix, Inc.*, 725 F.2d 537, 544 (9th Cir.) (*en banc*) (Kennedy, J.), *cert. denied*, 469 U.S. 824 (1984). Article III concerns have thus, for example, led this Court to prohibit federal magistrates from conducting voir dire. *See Gomez v. United States*, 109 S. Ct. 2237, 2248 (1989) ("without any meaningful review by a district judge, [a magistrate] exceeds his jurisdiction by selecting a jury").

When Congress drafted the Federal Magistrates Act, it was sensitive to the requirements of Article III. The House and Senate both heard lengthy testimony about the constitutionality of the proposed legislation.[3] The Senate Report ultimately insisted that under the Magistrates Act there was to be "no abdication of the decisionmaking responsibility" of district courts and that section 636(b) "cannot be read in derogation of the fundamental responsibility of judges to decide the cases before them." S. Rep. No. 371, 90th Cong., 1st Sess. at 25-26 (1967).

To comply with Article III, Congress first limited magistrates' power to deciding only "pretrial matter[s]." 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72. "[T]he term 'pretrial' is thus the threshold for a magistrate's jurisdiction under these provisions." 12 C. Wright & A. Miller, *Federal Practice and Procedure* § 3076.4 at Supp. 41 (1973 & Supp. 1990).

Congress also limited magistrates' power over dispositive motions. Congress did "not intend[] that a magis-

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[3] *See, e.g.*, Hearings on the Federal Magistrates Act Before Subcommittee No. 4 of The House Committee on the Judiciary, 90th Cong., 2d Sess., ser. 17 at 73 (1968) (Senator Tydings testified that "a district judge would retain ultimate responsibility for decisionmaking in every instance"); Hearings on S. 3475 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 89th Cong., 2d Sess. 107-31 (1966) (Assistant Attorney General Vinson testified that various portions of the proposed act violate Article III).

trate shall have the power . . . 'to hear and determine' . . . dispositive motions." S. Rep. No. 94-625, 94th Cong., 2d Sess. at 9 (1976). Thus, "[o]nce a pretrial matter is properly referred to a magistrate, it then must be categorized under Rule 72 as either 'dispositive' or 'nondispositive' for purposes of the standard of review to be exercised by the district judge." 12 Wright & Miller, *supra*, at Supp. 43. "Speaking broadly, the rationale for this distinction is that only an Article III court, not a magistrate, may constitutionally enter a final judgment; a magistrate is, therefore, authorized to make only those determinations that do not constitute final judgments." *United States v. Flaherty*, 668 F.2d 566, 585 (1st Cir. 1981).

Thus, under the Magistrates Act, a magistrate may finally "determine any pretrial matter pending before" a district court that does *not* dispose of a claim or defense of a party. 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a). An Article III judge need only review such an order for clear error. 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a).

If, however, a matter *does* dispose of a claim or defense, the requirements are entirely different. Absent the parties' consent, a magistrate cannot determine dispositive matters, but can only make recommendations that must be reviewed de novo by an Article III court. 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b).

Orders imposing Rule 11 sanctions cannot be decided independently by magistrates because they resolve neither "pretrial" nor "nondispositive" matters. First, they do not involve "a pretrial matter" relating to "a claim or defense of a party." Fed. R. Civ. P. 72(a). Many issues that arise in litigation are "not necessarily . . . included in the broad category of 'pretrial matters'" relating to claims or defenses of parties. H. Rep. No. 94-1609, 94th Cong., 2d Sess. at 12 (1976), *reprinted in* U.S. Code Cong. & Admin. News at 6172 (1976). Thus, section

636(b)(1)(A) does not necessarily "permit, for example, a magistrate to review default judgments, order the exoneration or forfeiture of bonds . . . [or order] appointment of attorneys in criminal cases." *Id.*

Similarly, an order imposing sanctions on a lawyer is not a pretrial matter affecting a claim or defense of a party. The order is completely distinct from the claims and defenses at issue in the underlying case—and it does not affect a *party* at all. As this Court held last term, "the imposition of a Rule 11 sanction is not a judgment on the merits of an action. Rather, it requires the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate." *Cooter*, 110 S. Ct. at 2456. In short, the ruling on a Rule 11 motion simply does not address a "pretrial matter" relating to "a claim or defense of a party."

Even if a Rule 11 motion were such a "pretrial matter," the resulting order would nonetheless be dispositive —it completely disposes of the collateral issue that it addresses. Procedurally, unlike a sanctioned party, a sanctioned lawyer cannot raise the sanctions issue on review after entry of a final judgment. *See, e.g., David v. Hooker, Ltd.*, 560 F.2d 412, 417 (9th Cir. 1977). The magistrate's order is thus final.

Moreover, as a substantive matter, the decision to impose Rule 11 sanctions can devastate the lawyer whose career is at stake. Whatever the Rule 11 sanction—a monetary fine, suspension, or disbarment—it "carries intangible costs for the punished lawyer or firm. A lawyer's reputation for integrity, thoroughness and competence is his or her bread and butter." *Federal Deposit Ins. Corp. v. Tekfen Construction and Installation Co.*, 847 F.2d 440, 444 (7th Cir. 1988).[4] The protections of

[4] Here, for example, because petitioner is licensed to practice in California, he was required to report the sanctions to the California

Article III must be accorded a lawyer being branded with the stigma of a federal court judgment that he has acted irresponsibly.

That Congress did not intend to give magistrates the authority to impose sanctions is shown by its treatment of the closely related issue of contempt.[5] The original proposed version of the Magistrates Act "would have permitted the U.S. magistrate himself to punish . . . contempts of court." S. Rep. No. 371, 90th Cong., 1st Sess. at 27 (1967). "The Committee on the Administration of Criminal Law of the Judicial Conference of the United States expressed 'serious doubts about the present provisions . . . which would give a full-time or part-time magistrate the power to try and punish contempts.'" *Id.* As finally enacted, the Magistrates Act expressly *denies* magistrates the power to impose citations for contempt. Under section 636(e) of the Magistrates Act, in contempt proceedings, a "*judge of the district court* shall . . . hear the evidence as to the act complained of and, if it is such as to warrant punishment, punish such person."

Like Rule 11 motions, a "contempt [proceeding] is . . . 'a separate and independent proceeding at law' that is not part of the original action." *Cooter*, 110 S. Ct. at 2456 (quoting earlier cases). Congress' denial of the contempt power to magistrates shows that it never intended non-Article III officers to punish lawyers appearing before them.

State Bar. *See* Cal. Bus. & Prof. Code § 6068(o)(3). He is now the focus of a State Bar investigation. Additionally, the sanction has been cited by opposing counsel in other cases as evidence that petitioner has engaged in improper conduct.

[5] When the Magistrates Act was first passed (in 1968) and later amended (in 1976 and 1979), Rule 11 had not yet been amended into its current, potent form. The Rule 11 issue was accordingly not specifically considered when the Magistrates Act was passed.

Requiring de novo review of orders imposing sanctions would also serve the purposes of Rule 11, by permitting the lower courts to deal more uniformly with issues relating to the Rule.

Although Rule 11 has been applied vigorously in the past seven years, it has also been applied unevenly. *See, e.g., Eastway Constr. Corp. v. City of New York*, 821 F.2d 121, 126 (2d Cir.) (Pratt, J., dissenting) ("apparent disparities, even capriciousness, . . . now seem to characterize much of rule 11 jurisprudence"), *cert. denied*, 484 U.S. 918 (1987). For example, the Federal Judicial Center conducted a survey based on ten hypothetical cases adapted from real cases involving Rule 11 motions. When asked to assess whether a Rule 11 violation had occurred, the 292 participating federal judges responded to individual cases very differently. The proper application of Rule 11 was so unclear that almost half the judges in the survey would have sanctioned the same paper that the other half of the responding judges thought did not violate the rule. One explanation the FJC report offered for this lack of consensus was disagreement over how to interpret Rule 11's generalized standards. Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 Harv. L. Rev. 630, 641 (1987) (citing S. Kassin, *An Empirical Study of Rule 11 Sanctions* 38 (Federal Judicial Center 1985)).

One federal judge has thus deplored the fact that "[i]n interpreting and applying rule 11, the courts have become a veritable Tower of Babel." Schwarzer, *Rule 11 Revisited*, 101 Harv. L. Rev. 1013, 1015 (1988). The situation will worsen if the different opinions of 452 federal magistrates, reviewed only for clear error, are added to the babble. The disagreements will be particularly harmful "in the Rule 11 context" where there is extraordinary "difficulty [in] distinguishing between legal and factual issues." *Cooter*, 110 S. Ct. at 2458-59.

In short, both law and logic demand that Article III courts review de novo magistrates' decisions to impose Rule 11 sanctions.

B. The Issue Presented Here Arises Frequently And Merits This Court's Review.

The issue presented here arises frequently. Other courts have already considered the issue, although not as directly as the Ninth Circuit. Some courts have apparently approved the Ninth Circuit's approach. For example, in *Magnus Electronics, Inc. v. Masco Corp. of Indiana*, 118 F.R.D. 443 (N.D. Ill. 1988), *aff'd in part, vacated in part*, 871 F.2d 626 (7th Cir.), *cert. denied*, 110 S. Ct. 237 (1989), a federal magistrate imposed over $5000 in sanctions on lawyers appearing before him. On appeal, the trial court reviewed "the magistrate's order under 'the clearly erroneous or contrary to law' standard of Rule 72(a)." *Id.* at 444. The court saw " 'no necessity for a trial judge to repeat the [magistrate's] procedure if he is entering an order confirming and adopting the recommendation.' " *Id.*, quoting *Yates v. Mobile County Personnel Board*, 719 F.2d 1530, 1532-33 (11th Cir. 1983). *Accord Moore v. Fieser*, No. 88-1134-C (D. Kan. July 14, 1989) (LEXIS, Genfed library, Courts file) (order imposing Rule 11 sanctions on lawyer is a "nondispositive pretrial matter[]" to be reviewed "under a clearly erroneous or contrary to law standard").

Other courts have approved the opposite result. In *Smith v. Detroit Federation of Teachers, Local 231*, 829 F.2d 1370 (6th Cir. 1987), for example, the defendant's motion for Rule 11 sanctions "was referred to a magistrate pursuant to 28 U.S.C. § 636(b)(1)(B)," which governs dispositive motions. *Id.* at 1373. The federal magistrate could thus only recommend that Rule 11 sanctions be imposed against plaintiff's counsel. The Sixth Circuit explained that the sanctioned lawyer was entitled to de novo review by the trial court: "any party

that disagrees with the magistrate's recommendation 'may serve and file written objections' to the magistrate's report, and thereby obtain de novo review by the district court judge of those portions of the report to which objections are made." *Id.*

Similarly, the Fifth Circuit recently noted with apparent approval a district court's de novo review of an order imposing sanctions: "[T]he magistrate in this case issued only a recommendation [on how to resolve the motion for sanctions]; the judgment itself was entered by the district judge after he independently reviewed the magistrate's report, making any jurisdictional defect on the part of the magistrate harmless." *John v. Louisiana*, 899 F.2d 1441, 1446 (5th Cir. 1990). *Accord Lancellotti*, 909 F.2d at 17 n.2 (In the First Circuit: "The magistrate did not levy sanctions but merely recommended their imposition. [Citation omitted.] Accordingly, the district court reviewed the sanctions question de novo."); *Kostovski v. Getty Petroleum Corp.*, No. 87 CV 1475 (E.D.N.Y. April 12, 1990) (LEXIS, Genfed library, Courts file) ("After a de novo review, [the trial court] affirm[ed] the Magistrate's decision concerning sanctions for the reasons set forth in his Report."). This Court should resolve this widespread confusion in the lower courts.

Authority to impose Rule 11 sanctions includes the power to "chill vigorous advocacy" in the federal courts. *Cooter*, 110 S. Ct. at 2454. That power ought to constitute the exclusive domain of Article III judges. It is instead increasingly being exercised by federal magistrates. By regularly imposing sanctions, magistrates are molding the shape of advocacy in the federal courts. This Court should grant certiorari to determine whether the Federal Magistrates Act authorizes that delegation to federal magistrates.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: October 1990

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 88-2797

D.C. No. CV-87-521-HMF

CRAIG JOHN MAISONVILLE,

Plaintiff,

and

JAMES M. DOMBROSKI,

Plaintiff-Appellant,

v.

F2 AMERICA, INC.;
F2 INTERNATIONAL, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Hawaii
Harold M. Fong, District Judge, Presiding

Submitted December 13, 1989*
San Francisco, California

Filed May 4, 1990

Before: Eugene A. Wright, Procter Hug, Jr. and Edward Leavy, Circuit Judges.

Opinion by Judge Hug

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* The panel finds this case appropriate for submission without oral argument pursuant to Ninth Circuit Rule 34-4 and Fed. R. App. P. 34(a).

OPINION

HUG, Circuit Judge:

James M. Dombroski, attorney for plaintiff in the underlying lawsuit, appeals the district court's affirmance of the magistrate's imposition of a $1,000 sanction pursuant to Fed. R. Civ. P. 11, for filing a factually frivolous motion for reconsideration.

In the underlying case, Dombroski represented the plaintiff in a trademark infringement action against F2 America, Inc. and F2 International, Inc. The case was automatically referred to a magistrate for all pretrial proceedings pursuant to Local Rule 401-3 of the United States District Court for the District of Hawaii.[1] During pretrial proceedings, Dombroski asked the magistrate to sanction the defendant pursuant to Fed. R. Civ. P. 37(d) for failure to comply with discovery. The magistrate denied Dombroski's motion. Dombroski then filed a motion for reconsideration. The magistrate denied Dombroski's motion for reconsideration and ordered Dombroski, *sua sponte*, to show cause why he, in turn, should not be sanctioned under Rule 11. The magistrate rejected Dombroski's reasons and sanctioned him $1,000.

Dombroski then appealed the magistrate's sanction order. In accordance with Local Rule 404-1 of the United States District Court for the District of Hawaii,[2] which

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[1] D.C. Haw. R. 401-3 provides in relevant part:

Determination of non-dispositive pretrial matters; 28 U.S.C. Section 636(b)(1)(A). Unless otherwise ordered a magistrate shall hear and determine any pretrial motions including discovery motions in a civil or criminal case.

[2] D.C. Haw. R. 404-1 provides in relevant part:

Appeal of non-dispositive matters; 28 U.S.C. Section 636(b)(1)(A). A magistrate may hear and determine any pretrial matter pending before the Court. . . . Any party may appeal from a magistrate's order determining a motion or matter. . . . A United States District Judge shall consider the appeal and shall set aside any portion of the magistrate's order found to be clearly erroneous or contrary to law.

essentially tracks Fed. R. Civ. P. 72(a), the district court reviewed the magistrate's order of sanctions under a clearly erroneous standard of review. Finding no clear error, the district court affirmed the magistrate's order. This appeal followed. We affirm.

Before turning to the merits, we must determine whether the magistrate had jurisdiction to order Dombroski to pay Rule 11 sanctions. *See In re Ryther*, 799 F.2d 1412, 1414 (9th Cir. 1986) (lack of subject matter jurisdiction can be raised by a court *sua sponte*).

Under the existing statutory structure, the magistrate's jurisdiction to order sanctions, rather than recommend sanctions to the district court, is dependent upon whether Rule 11 sanctions are characterized as dispositive or non-dispositive of a claim or defense of a party. *See* 28 U.S.C. § 636(b)(1); and Fed. R. Civ. P. 72. If Rule 11 sanctions are characterized as non-dispositive, then under § 636(b)(1)(A) and Rule 72(a), the magistrate here properly entered "a written order setting forth the disposition of the matter" and the district court properly reviewed the matter for clear error. Fed. R. Civ. P. 72(a); 28 U.S.C. § 636(b)(1)(A). Alternatively, if Rule 11 sanctions are characterized as dispositive, then the magistrate had authority only to "enter into the record a recommendation for disposition of the matter" to be reviewed by the district court *de novo*. *See* Fed. R. Civ. P. 72(b); *see also* 28 U.S.C. § 636(b)(1)(B). For the reasons set forth below, we find that the Rule 11 sanctions imposed here are non-dispositive matters properly ordered by the magistrate and reviewed by the district court for clear error.

First, Rule 72(a) defines non-dispositive matters as those "pretrial matter[s] not dispositive of a claim or defense of a party." Although Rule 11 expressly applies to "every pleading, motion, and other paper of a party," the Rule 11 sanctions imposed here were not dispositive

of a claim or defense of a party. In fact, the parties had already settled the case prior to Dombroski's filing his motion for reconsideration. Thus, under Rule 72(a), the Rule 11 sanctions imposed in this case are properly chartcterized as non-dispositive.

Second, the Federal Magistrates Act, codified at 28 U.S.C. §§ 604, 631-639 and 18 U.S.C. §§ 3060, 3401-3402 and implemented by Fed. R. Civ. P. 72-75, supports our conclusion that Rule 11 sanctions are non-dispositive matters. Specifically, section 636(b)(1)(A) lists those motions which may not be determined by a magistrate. Accordingly, any motion not listed, nor analogous to a motion listed in this category, falls within the non-dispositive group of matters which a magistrate may determine. *See* 7 J. Moore, J. Lucas & K. Sinclair, Jr. *Moore's Federal Practice*, ¶ 72.02[4.-8], at 72-19 (2d ed. 1989). *See also Ocelot Oil Corp. v. Sparrow Indus.*, 847 F.2d 1458, 1461-62 (10th Cir. 1988). Rule 11 sanctions are not listed in the group of dispositive matters, nor do the sanctions imposed here have an effect similar to those motions considered dispositive.

Finally, although we have not previously decided this issue, other courts have noted that discovery sanctions not falling within the motions excepted in section 636(b)(1) are non-dispositive matters. *See, e.g., id.* at 1462; *Merrit v. International Bro. of Boilermakers*, 649 F.2d 1013, 1016-17 (5th Cir. 1981). In this context, we see no material distinction between Rule 11 sanctions and Rule 37 sanctions. In Rule 11, the word sanctions stresses a deterrent orientation in dealing with improper pleadings, motions, or other papers. "This corresponds to the approach in imposing sanctions for discovery abuses." Fed. R. Civ. P. 11, advisory committee notes (1983 amendment).

For these reasons, we find that the Rule 11 sanctions imposed in this case are non-dispositive. Accordingly, the

magistrate had jurisdiction to order Rule 11 sanctions and the district court properly reviewed the magistrate's order for clear error.

Having decided that a magistrate has jurisdiction to order Rule 11 sanctions, we next decide if jurisdiction was properly referred to the magistrate in this case. *See* Fed. R. Civ. P. 72(a); 7 J. Moore, J. Lucas & K. Sinclair, Jr., *Moore's Federal Practice* ¶ 72.02[4.-1], at 72-14 (2d ed. 1989) ("Rule 72 provides procedural instructions in matters before a magistrate 'to whom a pretrial matter . . . *is referred*'.") (emphasis in original).

Here, an express referral is not found in the record. Nonetheless, we find that jurisdiction to order Rule 11 sanctions was implicitly referred to the magistrate when the case was automatically referred to him to decide "any pretrial motions including discovery motions" pursuant to Local Rule 401-3. Dombroski's motion for reconsideration was a discovery motion because it asked the magistrate to reconsider his denial of Dombroski's motion to sanction his opponent for discovery abuses. Discovery motions "fall within the ambit of Rule 11." Fed. R. Civ. P. 11, advisory committee note (1983 amendment). Thus, when, as here, a district court refers all discovery motions to a magistrate, it implicitly authorizes the magistrate to impose Rule 11 sanctions for discovery motions when appropriate.

Concluding that the magistrate had jurisdiction to order Rule 11 sanctions and that jurisdiction was properly referred to the magistrate in this case, we now turn to the merits of this appeal and review whether Dombroski's motion for reconsideration was factually frivolous.

"If the facts relied upon by the district court to establish a Rule 11 violation are in dispute, the court reviews

the factual findings of the district court under a clearly erroneous standard." *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 828 (9th Cir. 1986). "If the district court's conclusion that the facts constitute a violation of the rule is disputed, this legal conclusion is reviewed *de novo*." *Id.*

Rule 11 permits a court to impose sanctions in two circumstances: (1) where a party makes a frivolous filing, "that is, where he files a pleading or other paper which no competent attorney would believe was well grounded in fact and warranted by law;" and (2) where a party files a pleading or paper for an improper purpose, "such as personal or economic harassment." *Greenberg v. Sala*, 822 F.2d 882, 885 (9th Cir. 1987). Dombroski was sanctioned because the magistrate and the district court found his motion for reconsideration to be factually frivolous.

A motion is factually frivolous if "a competent attorney, after reasonable inquiry, could not form a reasonable belief that the [motion] was well founded in fact." *Id.* at 887. Sanctions based on a frivolous filing have been limited to situations where a motion is "baseless" or "lacking in plausibility." *Rachel v. Banana Republic, Inc.*, 831 F.2d 1503, 1508 (9th Cir. 1987).

The crux of Dombroski's motion for reconsideration was that he was not given an adequate opportunity to be heard before the magistrate denied his motion for sanctions against the defendants. In this regard, there are two primary reasons why Dombroski's motion for reconsideration was factually frivolous.

First, Dombroski's motion for reconsideration misstated the fact that he had no notice of a status conference which was originally called by the defendants regarding Dombroski's motion for discovery sanctions. This assertion was frivolous because Dombroski attempted

to cancel the conference. In short, Dombroski obviously had notice of the conference or he would not have attempted to cancel it.

Second, Dombroski's motion for reconsideration maintained that the status conference was an improper *ex parte* hearing on his motion for sanctions against the defendant for failure to comply with discovery. This, too, was a frivolous assertion. We agree with the district court that two documents placed Dombroski on notice that further investigation was necessary before he filed his motion for reconsideration claiming that the status conference was *ex parte*. First, the magistrate's order denying Dombroski's motion for discovery sanctions indicated that the matter was submitted without hearing. In addition, a letter from Dombroski's opposing counsel outlining the matters discussed at the status conference also placed Dombroski on notice that further investigation was necessary before he claimed that the status conference was an improper *ex parte* hearing. Further, as the magistrate noted, a phone call to the magistrate's chambers would have confirmed that Dombroski's motion for sanctions was in fact not heard on the merits at the status conference.

Rule 11 was "designed to create an affirmative duty of investigation both as to law and as to fact before motions are filed." *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1536 (9th Cir. 1986). Here, Dombroski does not maintain that he made any further investigation before claiming the status conference was an improper *ex parte* hearing. We believe that had Dombroski made a reasonable inquiry, he could not have formed "a reasonable belief that the [motion for reconsideration] was well founded in fact." *Greenberg*, 822 F.2d at 887.

Because we find these two grounds sufficient to sustain the sanctions imposed upon Dombroski, we do not address

the other reasons given by the district [court] in support of its judgment. *See Unioil, Inc. v. E.F. Hutton & Co., Inc.*, 809 F.2d 548, 559 (9th Cir. 1986), *cert. denied sub nom., Barton v. E.F. Hutton & Co., Inc.*, 484 U.S. 822 (1987) (finding two primary grounds sufficient to uphold sanctions and declining to address additional grounds given by the district court.)

The judgment of the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-2797

D.C. No. CV-87-521-HMF

CRAIG JOHN MAISONVILLE,
Plaintiff,
and
JAMES M. DOMBROSKI,
Plaintiff-Appellant.
v.
F2 AMERICA, INC.;
F2 INTERNATIONAL, INC.,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Hawaii

ORDER

[Filed July 20, 1990]

Before: WRIGHT, HUG, and LEAVY, Circuit Judges.

The panel, as constituted in the above case, has voted to deny the petition for rehearing. Judges Hug and Leavy have voted to reject the suggestion for a rehearing en banc, and Judge Wright has recommended rejection of the suggestion.

The full court has been advised of the en banc suggestion and no active judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 87-0521

CRAIG JOHN MAISONVILLE,
Plaintiff,

vs.

F2 AMERICA, INC.
and F2 INTERNATIONAL, INC.,
Defendants.

ORDER AFFIRMING MAGISTRATE'S ORDER

[Filed May 9, 1988]

On April 20, 1988, Magistrate Daral G. Conklin ordered that plaintiff's counsel, James M. Dombroski, pay a sanction of $1,000 for violation of Fed. R. Civ. P. 11. Mr. Dombroski appeals the magistrate's decision, pursuant to Local Rule 404-1. The court, having considered the record and the party's submissions and being fully apprised therein, finds as follows:

I. BACKGROUND

On December 21, 1987, plaintiff filed several discovery motions in the underlying case. Magistrate Conklin ruled on plaintiff's discovery motions on February 25, 1988, but reserved ruling on plaintiff's motion for sanctions for defendants' alleged discovery violations. On March 10, 1988, defendants asked the court to shorten time for a hearing on plaintiff's December 21, 1987 motion. The magistrate denied the request. Defendant then requested an informal telephone status conference on a matter unrelated to the sanctions motion, and the magistrate set that conference for March 17, 1988.

The parties reached a settlement and, on March 16, 1988, judgment was entered in the underlying case. On that date, Mr. Dombroski called the courtroom deputy to take the status conference off calendar. He had no authority to do so and the conference went ahead as scheduled.

At the March 17, 1988 status conference, the magistrate notified counsel that the judgment as entered rendered plaintiff's motion for sanctions moot. The magistrate therefore denied the motion without hearing. Although Dombroski was not present at the March 17, 1988 conference, both the court and defendant's counsel attempted without success to reach him by telephone.

On March 29, 1988, Mr. Dombroski filed a motion to reconsider the magistrate's decision to deny the motion for sanctions. Plaintiff alleged that he was entitled to reconsideration because the court had held an ex parte hearing on the merits without his knowledge. On April 4, 1988, the magistrate denied the motion for reconsideration and ordered plaintiff and Mr. Dombroski to show cause why Rule 11 sanctions should not be imposed. The magistrate held a hearing on its order to show cause on April 13, 1988.

The magistrate found that Mr. Dombroski had violated Rule 11 and ordered him to pay a sanction of $1,000 to the clerk of court. Because Mr. Dombroski accepted full responsibility for the statements in the motion for reconsideration, the magistrate did not sanction the plaintiff.

II. DISCUSSION

A. STANDARD OF REVIEW

Rule 404-1 of the Local Rules of Practice for the United States District Court for the District of Hawaii provide in part as follows:

> "A magistrate may hear and determine any pretrial matter pending before the Court . . . . Any party may appeal from a magistrate's order determining a motion or matter . . . within 10 days after issuance of the magistrate's order . . . ."

On appeal, the court shall set aside such an order only if it finds the order to be "clearly erroneous or contrary to law." *Id.* Thus, the court must affirm the magistrate unless it "is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948); *Dollar Rent A Car of Washington v. Travelers Indemnity Co.*, 774 F.2d 1371, 1374 (9th Cir. 1985); *Johnson v. United States Postal Service*, 756 F.2d 1461, 1464 (9th Cir. 1985). *See also Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985) ("where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.")

B. RULE 11 SANCTIONS

Fed. R. Civ. P. 11 provides in part that:

> The signature of an attorney or party constitutes a certificate that the signer has read the pleading, motion or other paper; that to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact . . . .

Thus, the Court of Appeals for the Ninth Circuit has ruled that Rule 11 sanctions can be imposed for filing a "frivolous" document that is legally unreasonable or without factual foundation. *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1537 (9th Cir. 1986). A filing is frivolous under Rule 11 if it is unreasonable when viewed from the perspective of "a competent attorney admitted to practice before the district court." *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 830 (9th Cir. 1986).

The magistrate found that Mr. Dombroski could not have conducted a "reasonable inquiry" into whether his motion for reconsideration was "well grounded in fact." Thus, the only issue on appeal is whether this finding of fact is "clearly erroneous." Local Rule 404-1.

A reasonable inquiry is "that amount of examination into the facts and legal research which is reasonable under the circumstances of the case." *Zaldivar*, 780 F.2d at 831. The standard must [be] applied to Mr. Dombroski as of March 29, 1988, the date plaintiff filed his motion for reconsideration. *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866, 874 (5th Cir. 1988) (en banc).

C. DOMBROSKI'S APPEAL

Dombroski argues that the magistrate imposed sanctions to punish him for implying judicial misconduct. This argument is without merit. The magistrate found that sanctions were appropriate because Mr. Dombroski failed to make reasonable inquiries into the truth of his motion's factual statements. Order Imposing Rule 11 Sanctions (order) at 3-5.

The magistrate listed several factual misstatements. *See* order at 6-7. The first misstatement was Mr. Dombroski's claim that he had no notice of the March 17, 1988 status conference. Mr. Dombroski argues that this statement was true, claiming that defendant's counsel led him to believe that the status conference was only tentatively scheduled. But Mr. Dombroski must have known about the conference because he called to "cancel" it on March 16, even though he had no authorization to attempt to do so. The magistrate's finding on this issue is therefore not clearly erroneous.

Mr. Dombroski does not challenge the magistrate's findings as to the other misstatements contained in the motion for reconsideration. Mr. Dombroski alleged that defendants' counsel argued the merits of their motion to the court ex parte on March 17, 1988. The magistrate

found, and this court concurs, that Dombroski should have been aware that this was untrue. The March 17, 1988 order states that the discovery sanctions motion was denied *without* hearing and defendant's counsel informed Dombroski by letter on March 17, 1988 that no hearing on the merits took place. Nevertheless, Dombroski represented as fact that an ex parte hearing had taken place.

Mr. Dombroski also argued in his motion for reconsideration that discovery sanctions were appropriate due to defendants' conduct in February 1988. The magistrate found, and this court concurs, that a reasonably competent attorney would not seek a motion for reconsideration of an order denying a December 1987 motion for sanctions, based upon conduct that occurred in February 1988.

Finally, Mr. Dombroski argued in his motion for reconsideration that the court should enter judgment for $70,000 instead of the already entered judgment for $50,000 as a sanction for defendants' alleged discovery violations. The magistrate found, and this court concurs, that a reasonably competent attorney would not seek $20,000 in sanctions under the circumstances alleged in plaintiff's motion.

On March 29, 1988, James M. Dombroski filed a motion for reconsideration containing factual and legal misrepresentations. The magistrate concluded that Mr. Dombroski had not made reasonable inquiries prior to filing the motion and thus imposed Rule 11 sanctions. The court finds that the magistrate's decision was neither clearly erroneous nor contrary to law. Accordingly, the magistrate's order is AFFIRMED.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, May 6, 1988.

/s/ Harold M. Fong
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 87-0521-HMF

CRAIG JOHN MAISONVILLE,
Plaintiff,

vs.

F2 AMERICA, INC.

and

F2 INTERNATIONAL, INC.,
Defendants.

ORDER GRANTING RULE 11 SANCTIONS

[Filed Apr. 20, 1988]

On March 29, 1988, plaintiff Maisonville moved this court to reconsider its March 17, 1988 Order Denying Plaintiff's Motion for Sanctions. This court denied the motion to reconsider and ordered plaintiff and his counsel, James M. Dombroski, to show cause why Rule 11 sanctions should not be imposed because of the contents of that motion to reconsider. Order Denying Motion for Reconsideration and Order to Show Cause Why Sanctions Should Not be Imposed, April 4, 1988 (hereafter "OSC").

Plaintiff filed a memorandum in response to the OSC, and a hearing regarding sanctions was held April 13, 1988.

I.

From the record herein, the bare-bones facts are these: Defendants made an Offer of Judgment.

Plaintiff accepted the offer, but his acceptance generated two somewhat puzzling conditions. On defendants' request, *the court set* an early-morning telephone conference to discuss those conditions and their effect. But the day before that conference, plaintiff's counsel filed the Offer, Acceptance, *and* had a no-conditions Judgment entered by the clerk of court. Plaintiff's counsel also called the courtroom deputy to take the conference off calendar. He had no permission to do so.

When this court saw the filed judgment, it decided to utilize the conference time to notify all counsel that the judgment as entered appeared to render everything moot, waived, and merged, and that the court would deny, without further hearing, the outstanding motion for sanctions. The court did so, at that conference, but plaintiff's counsel was not present. The court and defendants' counsel tried to reach him by telephone. He was not available. He then filed a motion to reconsider, claiming *inter alia*, that an ex parte hearing on the merits had been held, without his knowledge.

II.

Rule 11 sanctions can be imposed on two grounds: (1) for filing a "frivolous" document, that is legally unreasonable or without factual foundation, or (2) for filing a document for an improper purpose. *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1537 (9th Cir. 1986); *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 830 (9th Cir. 1986); *All Hawaii Tours v. Polynesian Cultural Center*, 116 F.R.D. 645, 650 (D. Haw. 1987). Whether these requirements have been satisfied is determined by an objective standard. *Golden Eagle*, 801 F.2d at 1537-38; *Zaldivar*, 780 F.2d at 830 ("The 'reasonable man' against which conduct is tested is a competent attorney admitted to practice before the district court").

In this case, the only issue is whether a reasonable, competent attorney could conclude that plaintiff's motion for reconsideration was "well grounded in fact" after conducting "reasonable inquiry."

A reasonable inquiry is "that amount of examination into the facts and legal research which is reasonable under the circumstances of the case." *Zaldivar*, 780 F.2d at 831. Among the factors to be considered in determining whether an attorney's investigation was reasonable are the time available for investigation, whether the attorney relied on his client or another attorney for information, whether factual investigation was feasible, the complexity involved and whether discovery was needed to develop facts. *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866, 875 (5th Cir. 1988) (en banc).

III.

As explained in the court's April 4 Order to Show Cause, which should be read together with the present order, plaintiff's motion for reconsideration contains certain factual misstatements which appear to violate the duty of reasonable investigation under Rule 11. In his written response to the OSC and at the April 13 hearing, plaintiff's counsel James Dombroski attempted to explain his interpretation of the events of March 15 through 17, approximately, as he represented them in the motion for reconsideration. Counsel's argument fails to realize that the Rule 11 standard—the attorney's belief that a pleading is "well grounded in fact"—must be judged as of March 29, 1988, the date plaintiff filed his motion for reconsideration. *Thomas*, 836 F.2d at 874.

Even assuming plaintiff's counsel could have believed certain facts on March 16 or March 17, he could not have reasonably retained that belief after his receipt of Gerald Sekimura's letter dated March 17, 1988, and his receipt of this court's Order Denying Plaintiff's Motion for Sanctions of March 17, 1988, both of which he had in hand before March 29.

At the absolute minimum, these two documents must have put plaintiff's counsel on notice that further investigation into his version of the facts was necessary. However, counsel does not claim that any investigation was made. As illustrated by the appendix to this order, the motion for reconsideration contains numerous misstatements of fact that simply could not have been made by plaintiff's counsel in good faith after reasonable inquiry.

This conclusion accords with the inquiry dictated by *Thomas*, 812 F.2d at 988. The facts recited in the motion for reconsideration are not complex and would not have required extensive discovery or considerable time to verify. Had plaintiff's counsel conducted any factual inquiry whatsoever, he could not have made the factual misrepresentations contained in the motion. To the extent that counsel states his reliance on information obtained from opposing counsel, that reliance was not at all reasonable after receipt of Sekimura's March 17 letter.

Where Rule 11 has been violated, the court has no choice but to impose sanctions. *Rachel v. Banana Republic, Inc.*, 831 F.2d 1503, 1508 (9th Cir. 1987). Because plaintiff's counsel has plainly violated the dictates of Rule 11, the court HEREBY ORDERS James M. Dombroski to pay a sanction of $1,000.00 to the clerk of court within ten (10) days of the entry of this order. This amount is reasonable, and takes into account that Mr. Dombroski is in active law practice, and only recently, in this case, obtained judgment in his client's favor for $50,000.

At the hearing regarding sanctions, plaintiff's counsel stated that he, not his client, was fully responsible for the statements made in the motion for reconsideration. For that reason, no sanction will be imposed on plaintiff Craig John Maisonville.

DATED: Honolulu, Hawaii, Apr. 20, 1988.

/s/ Daral G. Conklin
United States Magistrate

APPENDIX

Those factual misstatements in plaintiff's Motion For Reconsideration include the following:

A.

Plaintiff's counsel had no notice of the March 17 telephone conference to be held with Magistrate Conklin. (Reconsideration Motion at 7 and Exh. A, thereto).	**Plaintiff's counsel knew of the conference because he called to "cancel" it on March 16 as shown by the clerk's entry in the court calendar. On March 29, Plaintiff's counsel could not have reasonably believed that Sekimura was going to cancel the March 17 conference because he had received his March 17 letter denying that fact before the Reconsideration Motion was filed. (Letter, March 17, 1988.)**

B.

Defendants' counsel argued the merits of their motion to the court *ex parte* on March 17, 1988. (Reconsideration Motion at 2, 7).	**The March 17 conference was not a hearing on the merits, although the court informed counsel that the sanctions motion would be denied without hearing, as stated in the court's March 17 Order. (*See also*, Sekimura letter, March 17, 1988.)**

C.

Plaintiff's counsel confirmed that the March 17 conference had been cancelled with the court clerk and the magistrate's secretary. (Exh. A to Reconsideration Motion).	**As evidenced by the clerk's notation on the court calendar, plaintiff's counsel did not "confirm" the cancellation but attempted to cancel it himself. He did not confirm that cancellation with the magistrate's chambers, as he tacitly admits. (Response to OSC, at 6.)**

D.

Defendants' conduct in February 1988 warrants imposition of sanctions. (*See*, Reconsideration Motion at 4-6, 9.)	**A motion for "reconsideration" of plaintiff's December 21, 1987 sanctions motion cannot plausibly seek sanctions for conduct in 1988 that was never and could not be part of the original motion for sanctions.**

E.

Because of defendants' 1988 conduct, the suggested sanction was that the court enter *judgment* for $70,000 instead of the already-entered judgment for $50,000.

***Any* attorney and *any* judge would know that if sanctions for failure to make discovery had been entered, such sanctions would have amounted to a few hundred dollars, not twenty thousand.**

Overall, even a cursory reading of Mr. Dombroski's motion for reconsideration would lead the reader to believe that this court had committed grave judicial misconduct by conducting a hearing on the merits without notice to him. Plaintiff's counsel repeated that assertion even after this court, in its OSC, told him that no such event had taken place! And even a simple telephone call, before filing his motion, to the clerk of court or to chambers, would have told him otherwise . . .

Supreme Court, U.S.
FILED
DEC 4 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-617

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

JAMES M. DOMBROSKI
Petitioner,

v.

F2 AMERICA, INC. and F2 INTERNATIONAL, INC.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is this a case which turns on facts particular to petitioner or is this a case which presents issues of national importance.

PARTIES TO THE PROCEEDINGS

Respondents are F2 America, Inc., and F2 International, Inc. There are no parents, subsidiaries, or affiliates of the named parties that are not wholly owned, either directly or indirectly, by one or more of them.

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No. 90-617

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

JAMES M. DOMBROSKI
Petitioner,

v.

F2 AMERICA, INC. and F2 INTERNATIONAL, INC.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents F2 America, Inc. and F2 International, Inc., respectfully request that this Court deny the Petition For Writ of Certiorari seeking review of the Ninth Circuit's opinion in this case. That opinion is included in petitioner's Appendix (Pet. App. 1a-8a) and is reported at 902 F.2d 746 (9th Cir. 1990).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 636 (1988) provides in part:

(b)(1) Notwithstanding any provision of law to the contrary—

> (A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an

indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

* * *

(e) In a proceeding before a magistrate, any of the following acts or conduct shall constitute a contempt of the district court for the district wherein the magistrate is sitting: (1) disobedience or resistance to any lawful order, process, or writ; (2) misbehavior at a hearing or other proceeding, or so near the place thereof as to obstruct the same; (3) failure

to produce, after having been ordered to do so, any pertinent document; (4) refusal to appear after having been subpenaed or, upon appearing, refusal to take the oath or affirmation as a witness, or, having taken the oath or affirmation, refusal to be examined according to law; or (5) any other act or conduct which if committed before a judge of the district court would constitute contempt of such court. Upon the commission of any such act or conduct, the magistrate shall forthwith certify the facts to a judge of the district court and may serve or cause to be served upon any person whose behavior is brought into question under this section an order requiring such person to appear before a judge of that court upon a day certain to show cause why he should not be adjudged in contempt by reason of the facts so certified. A judge of the district court shall thereupon, in a summary manner, hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a judge of the court, or commit such person upon the conditions applicable in the case of defiance of the process of the district court or misconduct in the presence of a judge of that court.

STATEMENT OF THE CASE

For purposes of this brief in opposition to the petition for writ of certiorari, the facts described in the Ninth Circuit's written opinion of this case reported at 902 F.2d 746 (9th Cir. 1990), (Pet. App. 1a-8a), are incorporated herein by reference.

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioner raises two issues in his argument. First, petitioner attacks the constitutionality of magistrates imposing sanctions under Federal Rule of Civil Procedure 11 as a nondispositive pretrial matter under 28 U.S.C. § 636(b)(1)(A) (1988). Secondly, petitioner claims statutory interpretation and review of magistrates' Rule 11 sanctions under 28 U.S.C. § 636(b)(1)(A)

(1988) has been inconsistent and has created conflicting results among the Circuit Courts.

It is respondents' position that the constitutionality of the Federal Magistrate Act has previously been upheld.[1] While the narrow issue of whether magistrates have jurisdiction to impose Rule 11 sanctions under 28 U.S.C. § 636(b)(1)(A) (1988) may not have been directly decided by this Court, it is clear from the plain meaning of the statute and prior court decisions that magistrates are indeed empowered to do so.

Moreover, the resolution of this issue is only important to the petitioner and not to the public as there is no actual conflict in the lower courts' application of the law, and there is no real conflict of opinion and authority between the circuits. In the alternative, even if the Court resolves a conflict between the Circuit Courts it would not change the outcome of the decision below as the present case is factually and legally distinguishable from the cases cited by the petitioner.

I

This Is a Unique Case With Facts Specific to Petitioner Who was Sanctioned for Filing a Frivolous Pleading Rather than a General Case With Issues of National Importance

In the underlying case, petitioner was sanctioned under Fed. R. Civ. P. 11, *sua sponte* by the magistrate, for filing a motion for reconsideration containing factual misrepresentations. The district court affirmed the magistrate's sanction order, and the Ninth Circuit in *Craig John Maisonville, and James M. Dombroski v. F2 America, Inc.; F2 International, Inc.*, 902 F.2d 746 (9th Cir. 1990) (Pet. App. 7a-8a), affirmed the District Court stating:

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[1] *United States v. Raddatz*, 447 U.S. 667 (1980) (constitutionality of § 636(b)(1)(B) affirmed); *Pacemaker Diagnostic Clinic of America Inc., v. Instromedix, Inc.*, 725 F.2d 537 (9th Cir. 1984) *en banc*, (constitutionality of § 636(c) affirmed) *cert. denied*, 469 U.S. 824 (1984).

> The crux of Dombroski's motion for reconsideration was that he was not given an adequate opportunity to be heard before the magistrate denied his motion for sanctions against the defendants. In this regard, there are two primary reasons why Dombroski's motion for reconsideration was factually frivolous. First, Dombroski's motion for reconsideration misstated the fact that he had no notice of a status conference which was originally called by the defendants regarding Dombroski's motion for discovery sanctions. This assertion was frivolous because Dombroski attempted to cancel the conference. In short, Dombroski obviously had notice of the conference or he would not have attempted to cancel it. Second, Dombroski's motion . . . maintained that the status conference was an improper ex parte hearing on his motion for sanctions against defendants. . . . This, too, was a frivolous assertion.

Clearly these facts represent a case unique to petitioner. There is no national issue relating to petitioner's failure to make a reasonable inquiry into the facts before he filed his motion for reconsideration, as mandated by Rule 11, for which he was sanctioned accordingly. The judicial officer merely sanctioned the attorney for misrepresenting facts before him. This case does not represent a general situation where attorneys are sanctioned for contempt or non-compliance with court orders.

II

The Federal Magistrate Act has been Determined to be Constitutional by this Court and the Circuit Courts

The Federal Magistrate Act of 1979, codified at 28 U.S.C. §§ 604, 631-636 (1988) and 18 U.S.C. §§ 3060, 3401-3402 (1988) and implemented by Fed. R. Civ. P. 72-75, allows district court judges to refer civil matters to federal magistrates, and allows magistrates to hear and determine any non-dispositive pretrial matter pending before the court, to make recommendations to the district court judge on dispositive matters, and with the consent of the litigants, to conduct a jury or non-jury trial and order final judgment.

The Act was amended in 1976, Pub. L. No. 94-577, 90 Stat. 2729, and again in 1979, Pub. L. No. 96-82, 93 Stat. 643, § 2(2), wherein Congress' objective was "to amend the current jurisdictional provisions for U.S. magistrates. . . in order to *further clarify and expand the jurisdiction of U.S. magistrates*". S. Rep. No. 74, 96th Cong., 1st Sess. 1, *reprinted in* 1979 U.S. Code Cong. & Admin. News 1469 (emphasis provided). The legislative history of the amendments indicates that it was intended that district courts should not be confined by the specifics of § 636(b)(1) and that magistrates may be employed in a wide variety of situations where such appointment is not inconsistent with the Constitution. *Foster v. Gloucester County Board of Chosen Freeholders*, 465 F. Supp. 293, 296 (D.C.N.J. 1978).

Petitioner's challenge to the statute is based on the implicit command of Article III that the judicial power of the United States be confined to judges under that Article, and that the attributes of Article III judges, permanency in compensation and tenure, are not provided to federal magistrates. This argument fails, however, because the delegation of authority to federal magistrates is controlled by the Article III judiciary. District court judges control the appointment, the tenure, the salary, and the docket of federal magistrates.[2] Judiciary control over the magistrates' docket provides the requisite element of judicial independence from the political branches required by Article III and thus preserves the constitutionality of the Magistrate Act.[3]

A. Federal Magistrates Have Jurisdiction To Impose Rule 11 Sanctions Under 28 U.S.C. § 636(b)(1)(A)

28 U.S.C. § 636(b)(1)(A) (1988) provides:

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[2] 28 U.S.C. §§ 633(b), 631(a), 634(a) (1988).

[3] For example, the district judge has discretion over the initial decision to refer a case to a magistrate. 28 U.S.C. §§ 636(b)(1)(A)-(B), 636(c) (1988); the district judge may withdraw the referral on his own motion for good cause or upon the motion of any party for cause, see *id.* at § 636(c)(6); and with consensual referrals under § 636(c), the parties can choose to have the district judge review the magistrate's judgment. See Note, *Federal Magistrates and The Principles of Article III*, 97 Harv. L. Rev. 1947 (1984).

> a judge may designate a magistrate to hear and determine any *pretrial matter pending before the court,* except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law. (emphasis provided).

The Court has made it abundantly clear that "[t]he starting point in statutory interpretation is 'the language [of the statute] itself.' " *United States v. James*, 478 U.S. 597, 604 (1986) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975). Absent the presence of special circumstances, such as where the terms of a statute are unambiguous, judicial inquiry is complete. *Burlington Northern Railroad Co. v. Oklahoma Tax Commission*, 481 U.S. 454, 461 (1987).

Congress expressed specific exclusions from the magistrate's authority under § 636(b)(1)(A) and these exclusions did not include Rule 11 sanctions. If Congress wanted to prohibit magistrates from imposing sanctions made available under the law, such as sanctions under Rule 11 for filing frivolous pleadings, it would have listed such sanctions under the exclusions set forth in that section. Accordingly, the clear and unambiguous statutory language should be interpreted as *expression unius est exclusio alterius,* (expression of one thing is the exclusion of another), and no further interpretation of this language is needed.

Furthermore, magistrates are called upon to impose sanctions, as here for frivolous pleadings, as an auxiliary issue to determining pretrial matters. A "pretrial matter" under § 636(b)(1)(A) has been construed as "a matter unconnected to issues litigated at trial and not defined with respect to the time of the trial." *United States v. Flaherty*, 668 F.2d 566, 586 (1st Cir. 1981). Courts have held that one purpose of Rule 11 sanctions is to streamline the litigation process by discouraging the use of dilatory or abusive

tactics, such as filing of frivolous claims or defenses or the use of pleadings to harass or delay.[4] To deny magistrates the power to prohibit abusive tactics in pretrial matters by the imposition of sanctions would essentially undermine the purpose of Rule 11.

Petitioner argues that orders imposing Rule 11 sanctions are not pretrial matters because they do not involve a "'pretrial matter' relating to 'a claim or defense'." (Pet. 9). However, the language of § 636(b)(1)(A) does not require that the pretrial matters "relate to" a claim or defense. Petitioner appears to have paraphrased the language "relating to a claim or defense" from the standard of review given under Fed. R. Civ. P. 72(a) to magistrates' rulings on nondispositive matters. The statute does not contain this language and there is no requirement that a pretrial matter under § 636(b)(1)(A) or Fed. R. Civ. P. 72(a) must "relate to" a claim or defense. (*See, e.g., United States v. Flaherty, 668 F.2d at 586*).

Petitioner further argues that Rule 11 sanctions are related to contempt issues, and notes that magistrates are not empowered to try and punish contempts. Petitioner cites *Cooter & Gell v. Hartmarx Corp.*, ____ U.S. ____, 110 S. Ct. 2447 (1990) for the proposition that a Rule 11 motion, like a contempt proceeding, is a separate and independent proceeding at law. (Pet. 11). However, *Cooter* does not stand for the proposition that magistrates are denied contempt power because a contempt proceeding is an independent "proceeding". Nor does *Cooter* hold that a Rule 11 motion is the same as a contempt proceeding.

Furthermore, a Rule 11 violation is not conduct that constitutes contempt of authority. Contempt under § 636(e) is narrowly defined as constituting five specific types of conduct. When it appears that a party has committed an act defined as contempt under that section, the magistrate must certify the facts to a judge of the district court for review. Section 636(e) then provides for a different review procedure.

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[4] *Tarkowski v. County of Lake*, 775 F.2d 173, 176 (7th Cir. 1985); *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801 F.2d 1531 (9th Cir. 1986); *Donaldson v. Clark*, 819 F.2d 1551, 1557 (11th Cir. 1987).

The reason for a different standard of review for contempt is obvious. Contempt authority is provided to the federal courts to punish by *fine* or *imprisonment* for misbehavior in the presence of the court, or disobedience, or resistance to its lawful orders. 18 U.S.C. § 401 (1988). While due process might require a hearing before a judge of the district court before such punishment could be imposed, due process requirements for the imposition of a Rule 11 sanction for filing a frivolous pleading, which is simply a violation of a Federal Rule of Civil Procedure, do not require a hearing before the district court judge. The fact that due process for a Rule 11 sanction is satisfied by less than a full and independent hearing is consistent with *Donaldson v. Clark*, 819 F.2d 1551, 1560 n.12 (11th Cir. 1987) ("Rule 11 does not require that a hearing separate from trial or other pretrial hearings be held on Rule 11 charges before sanctions can be imposed[.]")

Accordingly, it is clear from the plain language of § 636(b)(1)(A) and subsequent court decisions that federal magistrates have jurisdiction to impose Rule 11 sanctions under that section.

III

Petitioner has not Established that a Real Conflict Exists Between the Circuit or Lower Courts or that this Case is Important to the Public

This Court has noted that certiorari should not be granted unless there is a real conflict of authority between the lower courts or where the issue to be decided is only important to the parties and not the public. *Layne & Bowler Corporation v. Western Well Works*, 261 U.S. 387, 392-393 (1923). This Court stated in *Layne* that:

> . . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.

Id.

Resolution of this issue is only important to the petitioner and not to the public for three major reasons: (1) there is no actual conflict in the application of law by the lower courts here; (2) there is no real conflict of opinion and authority between the Circuits; and (3) in the alternative, even if the Court resolves an alleged conflict between the Circuit Courts, it would not change the outcome of the decision below.

A. Procedural differences between: (1) the district court's review of Rule 11 determinations, and (2) recommendations by magistrates, reflect permissible exercises of district courts' discretionary power, not widespread confusion in the lower courts

Petitioner argues that this Court should resolve widespread confusion in the courts because district courts are apparently applying differing standards of review of Rule 11 sanctions ordered or recommended by a magistrate. (Pet. 14). Petitioner's argument is based on the contention that some district courts have characterized sanctions as dispositive pretrial matters and reviewed magistrates' "recommendations" of sanctions by the district court *de novo,* while other courts have characterized such sanctions as non-dispositive, with the magistrate's "written order setting forth the disposition of the matter" reviewed for clear error. However, the cases cited by the petitioner do not reflect real confusion among the courts; they illustrate only that district courts are exercising their discretionary power under the Federal Magistrate Act.

Specifically, a magistrate is permitted under 28 U.S.C. § 636(b)(1)(A) (1988) of the Act to hear and "determine" any pretrial nondispositive matters and district courts review such "determinations" under a clearly erroneous or contrary to law standard. *Ocelot Oil Corp. v. Sparrow Industries,* 847 F.2d 1458, 1461-62 (10th Cir. 1988); *see also Merrit v. International Bro. of Boilermakers,* 649 F.2d 1013, 1016-17 (5th Cir. 1981).

However, the district court is required to apply a *de novo* review of "recommendations" of dispositive matters made by the magistrate under 28 U.S.C. § 636(b)(1)(B) (1988). *Id.* at 1462. The cases cited by petitioner are cases where the district judge

reviewed "recommendations" of the magistrates *de novo* under 28 U.S.C. § 636(b)(1)(B) (1988). Thus, the trial court correctly applied the law in each case cited by the petitioner.

Further, and more importantly, a district court has discretion and is not required to refer pretrial non-dispositive matters to a magistrate under § 636(b)(1)(A). It may, at its discretion, refer a *non-dispositive* pretrial matter to a magistrate for findings and recommendation under 28 U.S.C. § 636(b)(1)(B) (1988). *Delco Wire & Cable, Inc. v. Weinberger,* 109 F.R.D. 680, 685 (E.D. Pa. 1986).[5]

For example, in *Delco Wire,* the district court disagreed with the proposition that certain non-dispositive matters must always be referred for determination under 28 U.S.C. § 636(b)(1)(A), (1988) rather than for recommendation under § 636(b)(1)(B). *Id.* The court, in interpreting the discretionary power of the trial court under the Act, stated:

> It is evident from the Act's legislative history that the purpose of the Act's referral and review provisions is to define the limits of the powers which a court may allow a magistrate to exercise, not to restrict the ultimate authority of an Article III court over a case pending before it. *See* H.R. Rep. No. 1609, 94th Cong., 2d Sess. 9-11, *reprinted in* 1976, U.S. Code Cong. & Admin. News 6162-71; *see also Thomas v. Arn,* ____ U.S. ____, 106 S.Ct. 466, 474, 88 L.Ed.2d 435 (1985)(discussing the scope of the authority retained by a district judge under the Act).

Id.[6] This result is consistent with the decision in *Smith v. Detroit Federation of Teachers Local 231,* 829 F.2d 1370, 1372 (6th Cir.

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[5] *See also, Societa Anonima Lucchese, Etc. v. Catania S. Corp.,* 440 F. Supp. 461, 462-63 (D. Mass. 1977) (a remand motion, although a non-dispositive pretrial matter, may, at the Court's option, be referred to a magistrate for a recommendation under § 636(b)(1)(B) instead of under § 636(b)(1)(A).); 7 J. Moore, J. Lucas & K. Sinclair, Jr. *Moore's Federal Practice* ¶ 72.04[4.-9], 72.04[2.-6] (2d ed. 1990).

[6] Disagreement does exist as to whether a district court judge may be precluded from applying a less deferential standard of review under

1987), where the district court expressly referred the matter of sanctions to the magistrate for a "recommendation." Similarly, a magistrate is free to elect whether to make a recommendation rather than entering a final determination of a non-dispositive pretrial matter. *First National Bank of South Carolina v. United States,* 81-2 U.S. Tax Cas. (CCH) ¶ 13,422 at 88,772 (D.S.C. 1981); 7 J. Moore, J. Lucas & K. Sinclair, Jr., *Moore's Federal Practice* ¶ 72.04[2.-6] (2d ed. 1990). This rule is consistent with the results of the remaining cases cited by the petitioner (*John, Lancellotti,* and *Kostovski*). The magistrate expressly "recommended" that sanctions be imposed. The exercise of discretion reflected in these cases at both the magistrate and district court levels illustrates the kind of flexibility and allocation of responsibility which is needed for an efficient and effective judiciary—the primary goals for implementing the Magistrate Act and Rule 11.

A Rule 11 sanction that does not dispose of a case on the merits is a pretrial non-dispositive matter. *Magnus Electronics v. Masco Corp. of Indiana,* 118 F.R.D. 443 (N.D. Ill. 1988), *aff'd in part, vacated in part,* 871 F.2d 626 (7th Cir.), *cert. denied,* 110 S. Ct. 237 (1989). Therefore, a trial judge may, at his or her discretion, refer a Rule 11 sanction issue to a magistrate for a final determination *or* for a recommendation.

Thus, petitioner misinterprets permissible differences in the procedural application of 28 U.S.C. § 636(b)(1)(A) and (B) (1988) by trial judges and magistrates as being confusion in the lower courts. If the district courts or the magistrates were confused as to what procedural approach to take, the petitioner has not shown where the confusion lies. The fact that the lower courts

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§ 636(b)(1)(A). *See, e.g., Cipollone v. Liggett Group, Inc.,* 785 F.2d 1108, 1113, 1120 (3d Cir. 1986), *cert. denied,* 484 U.S. 976 (1987) (the district court erred by modifying a magistrate's order under § 636(b)(1)(A) after a plenary review); *contra, United States v. Frans,* 697 F.2d 188, 191 n.3 (7th Cir. 1983), *cert. denied,* 464 U.S. 828 (1983) (allowing a district court to overturn a magistrate's decision to compel discovery and noting that a district court review is not restricted under § 636(b)(1)(A)); *Delco Wire,* 109 F.R.D. 680 n.2 (disagreeing with *Cipollone.*).

are exercising their discretionary power under the Act does not mean that there is widespread confusion in the courts.

B. There does not exist a conflict among the Circuit Courts of Appeals

The issue of whether a district court should treat a Rule 11 sanction order as a dispositive or non-dispositive matter was raised in only one of the cases that petitioner cited for the proposition that magistrates are treating sanction issues as dispositive matters. *John v. Louisiana,* 899 F.2d 1441, 1446 (5th Cir. 1990).[7] However, even in *John,* the court noted the magistrate is not expressly excluded from making a final determination of an ancillary issue under § 636(b), such as sanctions, even after the merits of a case have been decided. *Id.*

Hence, decisions cited by petitioner do not establish a split in the Circuit Courts on the issue of whether a Rule 11 sanction is characterized as dispositive or non-dispositive.

C. The cases cited by the petitioner showing that the courts have reviewed magistrates' recommendations under a *de novo* standard are factually distinguishable from the present case

Even if there is a conflict or confusion in the lower courts, the present case is so factually and legally distinguishable from the cases petitioner cites for the proposition that some courts are treating sanction issues as dispositive matters, that review by this Court would not resolve the claimed confusion. This does not represent a situation where the Court explicitly indicated that Rule 11 was a dispositive matter only to be considered under § 636(b)(1)(B).

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[7] In *Smith v. Detroit Federation of Teachers Local 231,* 829 F.2d 1370, 1373 (6th Cir. 1987), the court was faced with questions dealing with a party's failure to object to a magistrate's recommendation under § 636(b)(1)(B). In *Lancellotti v. Fay,* 909 F.2d 15, 17 (1st Cir. 1990) the court stated that "[w]e intimate no view, therefore, on whether Rule 11 sanctions ordered by a magistrate are properly characterizable as 'dispositive' or 'nondispositive' within the meaning of 28 U.S.C. § 636 and rule 72."

Two of the cases cited by petitioner involved situations where sanctions were directly *linked* to dispositive motions. For example, in *Lancellotti,* the defendants moved for dismissal and imposition of Rule 11 sanctions. The district court referred the matter to a magistrate, who later recommended that the suit be dismissed and that sanctions be imposed. 909 F.2d at 16.

Similarly, in *Kostovski v. Getty Petroleum Corp.,* No. 87 CV 1475 (E.D.N.Y. April 12, 1990), 1990 U.S. Dist. Lexis 5710, the magistrate recommended summary judgment be granted and Rule 11 sanctions be imposed against plaintiff for bringing a frivolous diversity jurisdiction argument. *Id.* Again, the Rule 11 matter was *linked* with a dispositive motion.

The present situation is clearly distinguishable from both *Lancellotti* and *Kostovski.* Here, the Rule 11 sanction was not linked to any dispositive matter such as a dismissal or a summary judgment motion. In fact petitioner's case had settled. Petitioner was sanctioned by the magistrate for making factual misrepresentations in a motion for reconsideration of plaintiff's motion to sanction the defendant under Fed. R. Civ. P. 37(d) for failure to comply with discovery. (App., *infra,* 18a).

The other cases cited by petitioner are both factually and procedurally distinguishable. In *Smith,* the prevailing defendant moved for attorney's fees based on both statutory and inherent powers of the court. 829 F.2d at 1372. What is apparent is the district court exercised its discretion by referring the matter to a magistrate for a report and a recommendation. *Id.* The magistrate recommended that the defendant was entitled to attorney's fees under 42 U.S.C. § 1988 (1988), under 28 U.S.C. § 1927 (1988), under Fed. R. Civ. P. 11, and pursuant to the court's inherent power to assess costs against a party for bad faith litigation. *Id.* The total amount of fees assessed came to $30,000 which the magistrate recommended be reduced to $15,000. *Id.* at 1373.

Similarly, in *John v. Louisiana,* 899 F.2d 1441 (5th Cir. 1990), the magistrate was not only required to determine if the district judge's pretrial order was consistent with a local rule and if the plaintiff violated the rule, the magistrate was also required to review the long procedural history of the case in order to under-

stand "why the court was hearing a sanction motion against an attorney who no longer represented his original client and whose case had twice been appealed." 899 F.2d at 1445 and 1449. Further, the magistrate recommended sanctions of over $11,000. *Id.* at 1445.

The present case is distinguished from *John* and *Smith* in that the matter dealt with is factually and procedurally less complex. Here, the petitioner was sanctioned $1,000 under Rule 11 for conduct that occurred before the magistrate. (App., *infra*, 16a). The sanctions were based on facts that were specifically within the knowledge of the magistrate. *Id.* Beyond interpreting the law underlying Rule 11 sanctions, the magistrate was not required to analyze complicated statutory law. Nor was the magistrate required to review a factual and procedural record of which he was not personally familiar.

Further, the amounts awarded in *Smith* and *John* were much higher then the $1,000 sanctioned against petitioner. (App., *infra*, 18a). "While some fee and cost sanctions are so high that the magistrate or district judge elects to treat them as recommendations for the judge's approval, most awards of this nature are deemed to be within the discretion of the magistrate, reviewable before the district judge only for an abuse of discretion on a showing of clear error." [footnote omitted] 7 J. Moore, J. Lucas & K. Sinclair, Jr. *Moore's Federal Practice* ¶ 72.04[2.-4] (2d ed. 1990).[8]

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[8] This is consistent with the cases cited by the petitioner supporting the proposition that Rule 11 sanctions may be treated as non- dispositive pretrial matters. (Pet. 14). *Magnus Electronics v. Masco Corp. of Indiana*, 117 F.R.D. at 444 (The magistrate imposed $5,300.63 in sanctions); *Moore v. Fieser*, No. 88-1134-C (D. Kan. July 14, 1989), 1989 U.S. Dist. Lexis 9080 (the magistrate imposed $300 in sanctions).

CONCLUSION

In conclusion, this Court should not grant certiorari as the petitioner has not established an important question of law. Any differences in the approach of the lower courts to the application of § 636(b) reflects a permissible use of their discretionary power. Further, the issue of whether a Rule 11 sanction is "dispositive" or "non-dispositive" has not frequently arisen. The Circuit Courts have not decided nor have they have been directly confronted with the issue.

Finally, the cases that petitioner cites as illustrating an approach opposite to the Ninth Circuit's approach are factually distinguishable. The cases cited by the petitioner establish that the district courts have exercised their discretionary power to refer an issue for recommendation to a magistrate, not because of confusion as to whether the matter was dispositive or nondispositive, but for other practical reasons, namely, the sanction motions were linked to dispositive pretrial matters or to complex procedural and factual patterns that were not within the personal knowledge of the magistrate.

This Court should deny petitioner's request for certiorari.

Respectfully submitted,

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No. 90-617

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

JAMES DOMBROSKI,
Petitioner,

v.

F2 AMERICA, INC., and F2 INTERNATIONAL, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY MEMORANDUM FOR PETITIONER

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REPLY MEMORANDUM FOR PETITIONER

Respondents have failed to show that this case does not warrant review by this Court.

1. Respondents concede that this case presents a question of federal law that has not been resolved by this Court. *See* Br. in Opp. at 4.

2. Respondents urge, however, that the lower courts' use of disparate standards to review magistrates' orders imposing sanctions does not reflect a true conflict in the cases. Respondents argue that courts have employed *de novo* review not out of necessity, but rather because they

affirmatively wanted to employ a gratuitously high standard of review. (Br. in Opp. at 11-13.) In respondents' world, *de novo* review in these cases was not grounded in legal necessity, but in an abundance of caution.

a. There is, of course, no support in the cases for that hypothesis. In the cases cited in the petition, none of the trial courts held—either explicitly or implicitly—that they were simply choosing to review *de novo* out of abundance of caution.

To the contrary, and in sharp contrast to the case below, in *Lancellotti*, *John*, and *Smith*, the trial courts reviewed orders imposing sanctions *de novo*, and the First, Fifth and Sixth Circuits noted that choice with apparent approval. Those trial courts plainly did not think that review for clear error was a permissible choice. And if the appellate courts had thought *de novo* review was a gratuitously high standard, they would not have spoken of the trial courts' decisions with approval.

b. Moreover, at least in the Third Circuit, it would have been error for the trial courts to review *de novo* out of an abundance of caution. Under *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108 (3d Cir. 1986), *cert. denied*, 484 U.S. 976 (1987), a trial court errs if it reviews a magistrate's order *de novo* when the law mandates review only for clear error. *Id.* at 1120.

The many cases cited in the petition (at 13-14) are thus not gratuitously employing a high standard of review. They are instead carefully reaching a result contrary to the decision below.

c. Respondents next urge that "[e]ven if there is a conflict or confusion in the lower courts, the present case is . . . factually and legally distinguishable." (Br. in Opp. at 13.) Respondents point to certain facts underlying this case, none of which is relevant to the legal question presented on certiorari. Respondents urge, for example, that here, unlike in certain other cases, the sanctions were not

imposed in conjunction with a dispositive motion (Br. in Opp. at 14), and here, unlike in certain other cases, the sanctions totalled only $1,000. (*Id.*) But neither Article III nor the Magistrates Act draws distinctions such as these. Whether a case "is factually or procedurally . . . complex" (*id.* at 15) cannot be relevant to the legal question whether a magistrate possesses the constitutional and statutory authority to award sanctions.

3. Respondents also insist that the court below reached the correct result. They rely primarily on the Latin maxim *expressio unius est exclusio alterius*: Section 636(b)(1)(A) expressly lists eight dispositive motions that cannot be referred to a magistrate subject only to clear error review. Because Rule 11 motions are not included in that list, they are, by implication, excluded. (Br. in Opp. at 7.)

a. As a matter of law, however, "[t]he listing of dispositive matters in § 636(b)(1) is, in practice, not treated as the exhaustive description of all matters where the magistrate must proceed by a recommended decision rather than entering a final determination." 7 J. Moore, J. Lucas & K. Sinclair, Jr., *Moore's Federal Practice* ¶ 72.04[2.-6] at 72-53 (2d ed. 1990). Rather, "the courts have inquired into the nature of the matter referred to a magistrate, rather than merely scanning the list of motions found in subsection (b)(1)(A)." 12 C. Wright, A. Miller & F. Elliott, *Federal Practice & Procedure* § 3076.5 at Supp. 45 (1990).

b. In *Gomez v. United States*, 109 S. Ct. 2237 (1989), this Court analyzed whether the "additional duties" clause of the Magistrates Act (§ 636(c)) empowers a magistrate to preside at the selection of a jury in a felony trial. Jury selection is not one of the eight dispositive motions identified in Section 636(b)(1). En route to its decision, the Court "concluded . . . that jury selection is more like the dispositive matters governed by § 636(b)(1)(B)" and rejected the contention "that jury selection

is among the pretrial matters that a magistrate may 'hear and determine,' subject to review only for mistakes that are clearly erroneous or contrary to law." *Id.* at 2247 n.28. Thus, under the Magistrates Act, the inclusion of some dispositive matters in Section 636(b)(1) does not by implication exclude others.

c. Respondents' other urgings as to why the court below reached the correct result are no more meritorious. Respondents urge, for example, that petitioner would "deny magistrates the power to prohibit abusive tactics in pretrial matters." (Br. in Opp. at 8.) But he would not. Petitioner would only ensure that orders imposing Rule 11 sanctions, which are inherently judicial in nature, are reviewed independently by an Article III judge.

Similarly, petitioner never suggested that "a Rule 11 motion is the same thing as a contempt proceeding." (Br. in Opp. at 8.) He suggested only that similar Article III concerns apply in both contexts—a point that respondents concede by silence—and that Article III judges should oversee both modes of punishment.

4. Finally, the legal question presented here is of continuing importance and warrants review. With over 1,000 published opinions analyzing Rule 11 in just the first seven years of its existence, magistrates will surely seek to exercise Rule 11 power in the future. Indeed, in the two months since we filed the petition for certiorari in this case, yet another trial court has reviewed a magistrate's Rule 11 order *de novo*, *Deerfield Specialty Papers, Inc. v. Black Clawson Co., Inc.*, 1990 U.S. Dist. LEXIS 13545 (S.D.N.Y. Oct. 12, 1990), and yet another for clear error. *Bergeson v. Dilworth*, 1990 U.S. Dist. LEXIS 14661 (D. Kan. Oct. 23, 1990). *See also Heinrichs v. Marshall & Stevens, Inc.*, —— F.2d ——, 1990 U.S. App. LEXIS 21399 (2d Cir. Dec. 7, 1990) ("district court conducted a de novo review" of magistrate's order imposing $4048.38 in discovery sanctions).

Rule 11 is a potent tool that carries with it the power to "chill vigorous advocacy" in the federal courts. *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447, 2454 (1990). Article III of the Constitution, the legislative history of the Federal Magistrates Act, and the treatment of orders imposing sanctions in the majority of the courts of appeals all demonstrate that the law was never intended to give federal magistrates the power freely to impose Rule 11 sanctions.

For these reasons and those given in the petition, the petition for a writ of certiorari should be granted.

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